7-2111-12460-3

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF SAINT PAUL HUMAN RIGHTS COMMISSION

W. H. Tyrone Terrill, Director,
Saint Paul Department of Human Rights
ex. rel. Deanna Lara,
Complainants,

v.

H. & Val J. Rothschild, Inc.,
Respondent.

RECOMMENDATION TO GRANT IN PART THE MOTION FOR DISMISSAL AND SUMMARY DISPOSITION

The above-entitled matter came before Administrative Law Judge Richard C. Luis on Respondent's Motion for Dismissal and Partial Disposition by briefs filed at the Office of Administrative Hearings. The record on the motion was closed with the receipt of two jurisdictional documents on September 30, 1999.

Joel A. Franklin, Assistant City Attorney, 400 City Hall, 15 West Kellogg Boulevard, Saint Paul, Minnesota 55102, represents the Complainants in this matter. James T. Hynes, Stapleton, Nolan, Hynes & McCloughan, P.A., 2300 Firstar Center, Saint Paul, Minnesota 55101, represents the Respondent.

Based upon the briefs submitted by the parties and other filings in this case, and for the reasons set out in the Memorandum which follows, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that:

1. Respondent’s Motion for Dismissal be GRANTED as to claims of hostile environment discrimination on the basis of race and sex (items 5 and 6) due to the prejudice suffered by the delay in bringing the Complaint.

2. Respondent’s Motion for Dismissal be GRANTED additionally regarding items 5 a, b, c, e, f, g, h, i, and j because the items are time barred, or because of the Department of Human Rights's failure to find probable cause, or because of the Department's express findings that certain conduct does not constitute discrimination, or

for failure to state a cause of action under Chapter 183 of the Saint Paul Legislative Code.

3. Respondent's Motion for Dismissal be GRANTED regarding the claim for lost wages.

4. Respondent's Motion for Dismissal be DENIED regarding the issue of reprisal.

5. The hearing scheduled for October 25, 1999 is stayed pending issuance of a final decision by the Commission on the issues addressed in this Recommendation.

Dated: October 8, 1999.

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RICHARD C. LUIS
Administrative Law Judge

MEMORANDUM

Summary Disposition

Respondent has moved for dismissal and partial summary disposition, asserting that the time elapsed between the Charge and the issuance of the Complaint is prejudicial to the defense. Respondent also maintains that partial summary disposition of some claims should be made because those claims did not occur within one year of the charge and (for others) because no probable cause was found to support the claims. Respondent also requests summary disposition on the issue of lost wages, due to the finding by the Department that the Charging Party's termination from employment was voluntary.

Complainant responded that dismissal is inappropriate since the finding of probable cause was timely. Complainant argues that the violations alleged constitute a "continuing violation" to within the one-year limitation period making the earlier allegations timely filed. To dismiss the claims, Complainant asserts, would have a disproportionately detrimental impact on the Charging Party.

Summary disposition is the administrative equivalent of summary judgment in the District Court. Minn. R. 1400.5500K. Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. ***Sauter v. Sauter***, 70 N.W.2d 351, 353 (Minn. 1955); ***Louwagie v. Witco Chemical Corp.***, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03. The Office of Administrative Hearings has generally followed the summary judgment standards developed in the courts in considering motions for summary disposition regarding contested cases. *See* Minn. R. 1400.6600.

It is well established that in order to resist a motion for summary judgment successfully, the non-moving party must show that specific facts are in dispute which have a bearing on the outcome of the case. ***Hunt v. IBM Mid America Employees Federal Credit Union***, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the non-moving party by substantial evidence; general averments are not enough to meet the non-moving party's burden. *Id*.; ***Murphy v. Country House, Inc.***, 307 Minn. 344, 351-52, 240 N.W. 2d 507, 512 (1976); ***Carlisle v. City of Minneapolis***, 437 N.W.2d 712, 715 (Minn. App. 1988). Summary judgment may be entered against the party who has the burden of proof at the hearing if that party fails to make a sufficient showing of the existence of an essential element of its case after adequate time to complete discovery. *Id*. To meet this burden, the party must offer "significant probative evidence" tending to support its claims. A mere showing that there is some "metaphysical doubt" as to material facts does not meet this burden. *Id*.

Factual Background

In bringing its motion, the Respondent has not attempted to show that any disputed facts do not rise to the level of genuine issues of material fact. Rather, Respondent has relied upon the procedural posture of the matter to assert its motion claims. Complainant maintains that, for various reasons, these procedural objections should be denied. For the purposes of this motion, the Judge has viewed the disputed facts in the light most favorable to the Complainant, as the nonmoving party.

The Charging Party filed a Charge with the Human Rights Department of the City of Saint Paul on June 3, 1996. The charge alleges a hostile environment base on race and sex and discrimination in the terms and conditions of employment on the basis of race. The hostile environment claim based on race relies upon four comments made during conversations at work (dated April 21 and 27, 1995, September 24, 1995, and March, 1996). The hostile environment claim based on sex relies upon two gifts given to Charging Party at work that were chocolate (in the shape of a penis) and a picture of naked black man and gifts given to a supervisor that were chocolate in the shape of breasts and a vagina. The Charging Party also alleged conversations where she was told she had been mentioned in a conversation as having "screwed the whole Vikings football team",[1] and another employee's inquiring as to whether the Charging Party was gay. The discrimination in terms and conditions of employment was identified as being denied training for job advancement, being denied payment of a job benefit in cash, different treatment in how the Charging Party was supervised, failing to inform non-Caucasian employees about the employer's 401K plan, and failing to pay mileage in the same manner to minority employees.

On May 6, 1996, the Human Rights Department issued a Memorandum of Findings (MOF) regarding the June 3, 1996 Charge. The MOF recapitulated the allegations in the Charge, included other matters not included in the Charge, and summarized the responses made by the Respondent. Further, the MOF analyzed the allegations based on the investigation conducted and made several findings regarding those allegations.

The Complaint in this matter was issued on July 16, 1999, and contains detailed claims of hostile environment discrimination based on race and sex. There is no independent allegation of discrimination in the terms and conditions of employment on the basis of race, but some of the items identified as part of the hostile environment are based on such disparate treatment.

Timeliness of Allegations

The applicable provisions of the Saint Paul Legislative Code contain a number of time limits and deadlines for action. Regarding initiation of a matter, the Code states:

> (c) **No action may be brought for civil enforcement or criminal prosecution unless a complaint of alleged discriminatory practice has been filed** with the Saint Paul Human Rights Department **within one year after the occurrence of the practice.** The running of the one-year limitation period is suspended during the time a potential charging party and respondent are voluntarily engaged in a dispute resolution process involving a claim of unlawful discrimination under this chapter, including arbitration, conciliation, mediation or grievance procedures pursuant to a collective bargaining agreement or statutory, charter, ordinance provisions for a civil service or other employment system or a school board sexual harassment or sexual violence policy. A potential respondent who participates in such a process with a potential charging party before a charge is filed or a civil action is brought shall notify the department and the charging party in writing of the participation in the process and the date the process commenced and shall also notify the department and the charging party of the ending date of the process. A respondent who fails to provide this notification is barred from raising the defense that the statute of limitations has run unless one year plus a period of time equal to suspension period has passed.
> (d) **The director shall promptly investigate, upon complaint or upon the director's own motion, any violations of this chapter.** If, after investigation, the director shall have reason to believe a violation has occurred, the director may refer the matter to the city attorney for criminal prosecution, initiate civil enforcement procedures as herein provided, or enter into a settlement agreement.
> No information or evidence obtained through a civil enforcement procedure after a formal complaint has been filed by the director shall be used or introduced in any criminal proceeding arising out of the same violation.
> (e) **The director shall make final administrative disposition of a complaint with one year of the receipt of the complaint, unless it is impracticable to do so.** If the director is unable to do so, he/she shall notify, in writing, both the complainant and respondent of the reasons for not doing so.[2]

In this matter, a number of the events identified in the charge occurred prior to one year before the date of filing the charge. By the terms of Saint Paul Legislative Code, Sec. 183.20(c) such events cannot be the subject of this action. Complainant asserts that the "continuing violation" doctrine acts to include those acts within the one-year limitation period.

The continuing violation doctrine was described by the Minnesota Supreme Court as follows:

> The continuing violation doctrine has been applied by courts to toll the statute of limitations in employment discrimination actions when the discriminatory acts of an employer over a period of time indicate a systematic repetition of the same policy and constitute a sufficiently integrated pattern, in effect, a single discriminatory act.[3]

In this matter, four conversations involving the Charging Party are alleged to support a hostile work environment based on race. Two of these comments fall outside the one-year limitation period. The remaining two[4] appear to be "stray remarks" and not the systematic repetition of a policy that could support a finding of a continuing violation. The April 1995 comments are time-barred and should be dismissed.

Timeliness of Complaint

The Respondent has moved for dismissal of the entire Complaint as being *per se* prejudicial under the reasoning of ***State v. RSJ, Inc.***, 552 N.W.2d 695 (Minn. 1996). In ***RSJ***, the Minnesota Department of Human Rights failed to make a probable cause finding until 31 months had elapsed from the filing of the charge. Complainant maintains that ***RSJ*** does not apply, since the Memorandum of Findings was completed within a year of the filing of the charge, as required by the Saint Paul Legislative Code, Sec. 183.20(e). In addition, Complainant maintains that dismissal of this action would have a disproportionate impact on the Charging Party, and therefore, the relief requested by Complainant should be denied.

The Complainant is correct that the MOF (and thereby the finding of probable cause) was made within one year of the charge. While there is no specific deadline for issuing a Complaint subsequent to issuing a Memorandum of Findings, nothing in the Saint Paul Legislative Code or the ***RSJ*** opinion permits an **indefinite** delay (or a delay so long it is tantamount to an indefinite period of time) between the finding of probable cause and the issuance of the Complaint. To the contrary, the deadlines in Chapter 183 of the Saint Paul Legislative Code indicate that matters are to handled promptly. For example, the hearing is to be scheduled for twenty days after the Complaint is issued, with an Answer to filed at any time up to the hearing. No deadline in all of Chapter 183 exceeds one year. In this matter, Complainant has allowed 26 months to elapse from the MOF to the issuance of the Complaint.

The time elapsed between the MOF and the Complaint raises the issue of prejudice to Respondent. The analysis to be followed in resolving such issues was set out the Minnesota Supreme Court as follows:

> We, therefore, hold that in all cases where the MDHR fails to make a determination of probable cause within 12 months after the filing of a charge, a respondent may seek appropriate relief from the administrative law judge. The relief granted by the administrative law judge should be in proportion to the prejudice suffered by the respondent and may include dismissal of the complaint. Normally, we leave the determination of prejudice and the relief to be granted to the administrative law judge; however, we conclude, as a matter of law, that probable cause determinations made 31 or more months after a charge is filed are per se prejudicial to the respondent and require dismissal of the complaint.[5]

While the 26-month delay in this matter approaches the 31 month *per se* prejudicial standard, there are significant differences between the facts here and the facts in ***RSJ***. First, the MOF found probable cause on certain issues, thus providing notice to Respondent that some issues would need to be addressed at some time in the future. Second, the Complaint asserts that Respondent committed reprisal by denying Charging Party a work benefit after the filing of the charge. While reprisal was alleged in ***RSJ***, the reprisal was taken for opposition to an alleged discriminatory practice and the allegation of that reprisal was included in the charge. For any issue in the Charge where no probable cause was found in the MOF, the *per se* prejudice standard set out in ***RSJ*** is met and that issue must be dismissed. Where probable cause was found, dismissal for *per se* prejudice is inappropriate.

Applying the approach in ***RSJ***, the Administrative Law Judge believes that the length of the delay in this matter has prejudiced the Respondent in defending the charges of hostile work environment based on racial and sex discrimination. The timely allegations alleged in the Complaint regarding those issues fall within the acceptable level of vulgar conduct allowed in the workplace.[6] The level of misconduct required to substantiate a hostile work environment has not been alleged in the Complaint. The possibility of substantiating more serious conduct has faded with the passage of time. In assessing what relief should be granted because of the prejudice resulting from the passage of time, the Administrative Law Judge has considered the likelihood of Ms. Lara's success at hearing and recommends dismissal as the appropriate remedy. Since Complainant is unlikely to prevail at the hearing on the merits of the claims recommended herein to be dismissed, dismissal does not unduly harm the Charging Party.

A different problem arises for all the charges not mentioned in the MOF.[7] For these charges, the Respondents have had no notice over a period of 37 months.[8] Even if the constitutional requirement for due process could be met, the 37-month period without a finding of probable cause falls squarely within the *per se* prejudice standard of ***RSJ***. The allegations not in the MOF (as discussed below) must be dismissed.

Unlike the other charges in the Complaint, the alleged reprisal occurred after the filing of the charge. Since no date is appended and no evidence has been elicited as to when the acts constituting the alleged reprisal took place, there is no way to know whether those allegations could have been included in the MOF. Further, the standards of proof for reprisal suggest that Respondent is not prejudiced by the delay. The circumstances surrounding the reprisal charges are sufficiently different from the other charges in the Complaint to warrant retention of those issues pending the hearing.

Sufficiency of Complaint

In addition to the 26-month delay in issuance of the Complaint, the allegations in the Complaint suffer from other defects. As mentioned above, Items 5 b and c are time-barred. For Items 5 a, g, h, i, and j, there was either no mention made of the underlying facts in the MOF or the issue was discussed explicitly and probable cause was not found.[9] For example, the actions alleged to be racial discrimination in supervision and in terms of employment were found explicitly to be "not racially discriminatory."[10] The only probable cause found was regarding the racial and sexual remarks constituting a hostile environment.

Items 5 e and 5 f do not state a cause of action. The facts underlying the two items are that a corporate officer made potentially offensive statements at some time to some unnamed African-American female(s). Absent some allegation linking the conduct to the Charging Party, the items fail to form a basis for alleging a violation of Chapter 183 of the Saint Paul Legislative Code.[11]

The Complaint requests damages for lost wages. The MOF explicitly states, "the Department cannot find that the working environment was so extremely offensive or hostile that a reasonable person could not continue working in it."[12] The MOF found that the Charging Party left work voluntarily. Under those circumstances there is no basis for claiming lost wages as damages in this matter[13] and that portion of the Complaint must be dismissed. The dismissal of the claim for lost wages does not preclude a claim for benefits (apart from lost wages) wrongly denied to the Charging Party as reprisal for filing the charge in this matter.

Stay Pending Final Decision

The final decision in this matter rests with the Saint Paul Human Rights Commission (the Commission). In the interest of judicial economy, this recommendation for partial dismissal is being submitted to the Commission for final decision. The remaining issues are stayed pending that decision. Once the final decision on this Recommendation is issued, the matter will be scheduled for hearing on whatever issues remain to be heard.

R.C.L.

[1] Charge, at 1.
[2] Saint Paul Legislative Code, Sec. 183.20 (emphasis added).
[3] ***Hubbard v. United Press International, Inc.***, 330 N.W.2d 428, 441 n. 11 (Minn. 1983).
[4] Occurring September 24, 1995, and March, 1996.
[5] ***RSJ, Inc***., 552 N.W.2d, at 702-703.
[6] As the Minnesota Supreme Court stated in ***Klink v. Ramsey County***, 397 N.W.2d 894, 901-02 (Minn. 1986):

> The trial court considered the nature and frequency and other circumstances surrounding the language and conduct. Foul language and vulgar behavior in the workplace does not automatically trigger an actionable claim of sex discrimination by a worker who finds such language and conduct offensive or repulsive. ***Rogers v. EEOC***, 454 F.2d 234, 238 (5th Cir.1971), *cert. denied*, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972). The sexual harassment must be sufficiently severe or pervasive so as "to alter the conditions of [the victim's] employment and create an abusive working environment." ***Meritor***, 106 S.Ct. at 2406 (quoting ***Henson***, 682 F.2d at 904). Klink overheard foul language and inadvertently viewed objectionable materials on a sporadic basis. The employees should have used better judgment by not keeping vulgar materials in a public building and they also should have been more circumspect as to their language.
>
> Nevertheless, such carelessness and insensitivity is not tantamount to purposeful sexual harassment. In this case, the foul language was used in private offices and mostly in other rooms, and was not directed at Klink. The obscene materials were kept in offices, desk drawers or lockers, and Klink was not invited to possess or view the offensive items. This is not sufficiently severe or pervasive sexual harassment. Further, the employer cannot reasonably be charged with knowledge that Klink was being discriminated against through sexual harassment since it did not or could not know the environment was offensive to Klink. There was no realistic and reasonable way for the employer to know of the existence of sexual harassment unless Klink called it to the employer's attention.

See also ***Groves v. Fingerhut***, OAH Docket No. 12-1700-10150-2 (12/17/96).

[7] With the exception of the reprisal allegations, which will be discussed below.
[8] The 37-month period consists of the 11 months between the Charge and the MOF and the 26 months between the MOF and the Complaint.
[9] MOF, at 11-12.
[10] MOF, at 11.
[11] If a hearing were held on the hostile environment claim in this matter, those statements would certainly be relevant to the ultimate issue.
[12] MOF, at 12.
[13] As the Minnesota Supreme Court stated in ***Anderson v. Hunter, Keith, Marshall & Co., Inc.***, 417 N.W.2d 619, 627 (Minn. 1988):

> The civil damage remedy afforded a discrimination victim under the Minnesota Human Rights Act contemplates compensating the victim to restore her, as near as possible, to the same position she would have attained had there been no discrimination. *See*, *e.g.*, ***Bhd. of Ry. and S.S. Clerks, Freight Handlers, Express and Station Employees, Lodge 364 v. State of Minnesota***, 303 Minn. 178, 195, 229 N.W.2d 3, 13 (1975).